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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BOSA DEVELOPMENT CALIFORNIA,
INC., et al.,

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY,

Defendant.

Case No.: 3:17-cv-00945-L-BGS

**ORDER DENYING DEFENDANT'S
MOTION [Doc. 4] TO DISMISS**

Pending before the Court is Defendant Liberty Mutual Life Insurance Company's motion to dismiss Plaintiffs' complaint. Pursuant to Civil Local Rule 7.1(d)(1), the Court decides the matter on the papers submitted and without oral argument. For the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss.

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1 **I. BACKGROUND**

2 This case arises out of an insurance dispute. Plaintiffs Bosa Development
3 California I (“Bosa 1”) and Bosa Development California II (“Bosa II”, collectively,
4 “Plaintiffs”) are real estate developers and general contractors. Using the labor of
5 subcontractors, Plaintiffs built three high rise residential towers in downtown San Diego
6 and one in Irvine (“the Projects). Plaintiffs then sold all of the individual residential units
7 in the Projects to purchasers and created homeowners’ associations that assumed
8 ownership over common areas.

9 In connection with the Projects, Plaintiffs obtained three liability insurance policies
10 from Defendant Liberty Mutual Fire Insurance Company (“Defendant”). Under these
11 policies, Defendant insured Plaintiffs and any other enrolled contractors or subcontractors
12 against certain losses incurred in connection with the development and construction of
13 the Projects. Each policy provided for a \$500,000 deductible, which was to apply on a
14 “per occurrence” basis to both defense and indemnity expenditures. The parties also
15 executed a “Deductible Collateral Agreement”, which provided that Plaintiffs pay
16 \$4,620,000 into a “Cash Collateral Fund.” The Cash Collateral Fund is managed by
17 Defendant, who holds the money in trust for Plaintiffs. Under the Deductible Collateral
18 Agreement, Defendant was entitled to “draw down” the Cash Collateral Fund to cover
19 deductible expenses and “claims handling expense charges” of \$2,085, on a “per claim”
20 basis. The Deductible Collateral Agreement obligates Defendant to return to Plaintiffs
21 any residual balance left in the Cash Collateral Fund as soon as practicable upon the
22 expiration of risk of the need to pay further policy deductibles.

23 Each of the homeowners’ associations has sued Plaintiffs for construction defects
24 resulting from alleged negligent development and/or construction. Defendant defended
25 and indemnified Plaintiffs against these suits. In the process, Defendant drew down the
26 Cash Collateral Fund a total of \$2,008,340, encompassing a \$500,000 deductible and a
27 \$2,085 claims handling expense charge for each of the four lawsuits. About twenty three
28 Individual homeowners and insurers of individual homeowners have also filed claims

1 against Plaintiffs complaining of construction defects stemming from the negligent
2 development and construction of each Project.

3 The insurance policies define the term “occurrence” to include “continuous and
4 repeated exposure to the same general harmful conditions.” Given this policy provided
5 definition, Plaintiffs allege that California law provides there can only be four
6 occurrences at issue here: the negligent development and construction of each of the four
7 Projects. If only four occurrences are at issue, it would follow that Plaintiffs needed only
8 pay four separate deductibles. However, Plaintiffs allege that Defendant has
9 implemented a “Multiple Occurrences Policy” pursuant to which “(1) each separate
10 defect category in a given construction defect case constitutes a separate occurrence; (2)
11 defects arising out of construction work performed by a separate subcontractor
12 constitutes a separate occurrence; and (3) each separate lawsuit or claim arising out of the
13 same construction project constitutes a separate occurrence.” (Compl. ¶ 112.) As a result
14 of this policy, Plaintiffs allege Defendant has wrongfully collected more than the
15 \$2,000,000¹ in deductible fees to which it is entitled.

16 On April 3, 2013, Defendant filed a declaratory relief action against Plaintiffs and
17 others arising out of the same transactions as the present case. *Liberty Life Fire Ins. Co.*
18 *v. Bosa Dev. California II, Inc.*, 3:17-cv-00666-L-BGS. On the same day, Plaintiffs filed
19 the present action against Defendant in state court. Plaintiffs’ complaint alleges (1)
20 breach of contract; (2) a right to declaratory relief; (3) breach of the implied covenant of
21 good faith and fair dealing; (4) fraud; (5) conversion; (6) civil theft; (7) violation of
22 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (“UCL”);
23 (8) a right to an accounting; and (10) a right to money had and received. (Compl. [Doc.
24 1-2].) Defendant removed to Federal Court and, pursuant to the low number rule, the
25 Clerk of Court transferred the removed action to the same docket as Defendant’s earlier
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28 ¹ 4 occurrences times \$500,000 deductibles.

1 filed declaratory action. Defendant now moves to dismiss the Complaint as to the UCL
2 cause of action only. (MTD [Doc. 4].) Plaintiffs oppose. (Opp'n [Doc. 14].)

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4 **II. LEGAL STANDARD**

5 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the complaint's
6 sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983).
7 In ruling on a Rule 12(b)(6) motion, the court must assume the truth of all factual
8 allegations and "construe them in the light most favorable to [the nonmoving party]."
9 *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002). "While a complaint attacked
10 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a
11 plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more
12 than labels and conclusions, and a formulaic recitation of the elements of a cause of
13 action will not do." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (internal
14 citations and quotation marks omitted). Instead, the allegations in the complaint "must be
15 enough to raise a right to relief above the speculative level." *Id.* at 1965. A complaint
16 may be dismissed as a matter of law either for lack of a cognizable legal theory or for
17 insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*,
18 749 F.2d 530, 534 (9th Cir. 1984).

19 As a general matter, courts may not consider material outside the complaint when
20 ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
21 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents
22 specifically identified in the complaint whose authenticity is not questioned by the
23 parties. *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by
24 statutes on other grounds). Moreover, courts may consider the full text of those
25 documents, even when the complaint quotes only selected portions. *Id.* The court may
26 also consider material properly subject to judicial notice without converting the motion
27 into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

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1 **III. DISCUSSION**

2 Defendant argues that the Court should dismiss Plaintiffs’ UCL Claim because (1)
3 Plaintiffs have not properly alleged Defendant engaged in unfair competition and (2)
4 even if Defendant engaged in unfair competition, Plaintiffs are not entitled to any of the
5 remedies provided by the UCL. Neither argument is persuasive.

6 The UCL broadly prohibits “unfair competition”, which consists of any unlawful,
7 unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200. A
8 plaintiff need only allege one of the three proscribed types of unfair completion to sustain
9 a UCL Claim. *Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1168 (9th Cir. 2012). As to
10 the unlawful prong, the UCL is a derivative claim that borrows other laws and provides
11 distinct remedies for their violation. “Virtually any state, federal, or local law can serve
12 as the predicate for” a UCL claim. *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*,
13 104 Cal. App. 4th 508, 515 (2002).

14 Here, Plaintiffs allege, among other things, that Defendant’s practice of
15 overcharging deductible fees under its Multiple Occurrences Policy violates California’s
16 common law prohibiting conversion and civil theft. In their motion to dismiss,
17 Defendant presents no argument suggesting Plaintiffs have not properly stated these
18 claims. Accordingly, the Court finds Defendant has failed to demonstrate that Plaintiffs
19 have not properly alleged a predicate act of unfair completion.

20 Next, Defendant argues that, even if Plaintiffs have properly alleged a predicate act
21 of unfair completion, the UCL claim must nevertheless fail because Plaintiffs are not
22 entitled to any UCL provided remedy. Generally speaking, a prevailing UCL plaintiff is
23 only entitled to injunctive relief and/or restitution, but not damages or attorneys’ fees.
24 *Zhang v. Superior Court*, 57 Cal. App. 4th 364, 371 (2013). As to restitution, the UCL
25 provides that a court may return to a plaintiff any money that a defendant wrongfully
26 took from the plaintiff through a predicate act of unfair competition. Cal. Bus. & Prof.
27 Code § 17203. Here, Plaintiffs allege that, through conversion and civil theft, Defendant
28 has taken more money from them than the parties’ agreements permit. If Plaintiffs


1 prevail, it seems likely that they would be entitled to recover these funds as restitution.
2 Accordingly, the Court finds Defendant has failed to establish as a matter of law that
3 Plaintiff could not feasibly obtain any relief available under the UCL.
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5 **IV. CONCLUSION & ORDER**

6 For the foregoing reasons, the Court **DENIES** Defendant's motion to dismiss.
7 Furthermore, no later than fourteen days after the entry of this order, the parties shall
8 either file a non-opposition to the consolidation of the present action and Defendant's
9 earlier filed complaint seeking declaratory relief (3:17-cv-00945-L-BGS) or show cause
10 as to why the Court should not consolidate the two cases.

11 **IT IS SO ORDERED.**

12 Dated: October 26, 2017

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14 Hon. M. James Lorenz
15 United States District Judge
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